
HOUSE BILL No. 1246

DIGEST OF INTRODUCED BILL

Citations Affected: IC 36-1-12.

Synopsis: Local public works projects. Provides that a public works contract of a political subdivision may not contain provisions requiring both retainage and furnishing payment and performance bonds. Provides that the public work contractor must elect whether to secure its performance through retainage or by furnishing bonds.

Effective: July 1, 2002.

Summers

January 14, 2002, read first time and referred to Committee on Public Policy, Ethics and Veterans Affairs.

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Second Regular Session 112th General Assembly (2002)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2001 General Assembly.

HOUSE BILL No. 1246

A BILL FOR AN ACT to amend the Indiana Code concerning local government.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 36-1-12-4.5 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 4.5. (a) A bond or a
3 certified check shall be filed with each bid by a bidder in the amount
4 determined and specified by the board in the notice of the letting.

5 (b) The amount of the bond or certified check may not be set at
6 more than ten percent (10%) of the contract price. The bond or certified
7 check shall be made payable to the political subdivision or agency.

8 (c) All checks of unsuccessful bidders shall be returned to them by
9 the board upon selection of successful bidders. Checks of successful
10 bidders shall be held until ~~delivery of the performance bond, as~~
11 ~~provided in section 14(e) of this chapter.~~ **the bidder enters into a**
12 **public work contract under this chapter.**

13 SECTION 2. IC 36-1-12-10.5 IS ADDED TO THE INDIANA
14 CODE AS A NEW SECTION TO READ AS FOLLOWS
15 [EFFECTIVE JULY 1, 2002]: **Sec. 10.5. (a) A public work contract**
16 **must provide that one (1), but not both, of the following applies:**

17 **(1) Whether retainage shall be held under section 14 of this**



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chapter.

(2) Whether the contractor will furnish payment and performance bonds under sections 13.1 and 13.3 of this chapter.

(b) Before work may begin on a public work contract, the public work contractor must elect whether:

(1) subsection (a)(1); or

(2) subsection (a)(2);

will apply to the contract.

(c) A contractor may make the election required by subsection (b):

(1) in its bid documents; or

(2) any time after award of the public work contract and before work begins on the public work contract.

SECTION 3. IC 36-1-12-13 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 13. (a) A contract for public work must contain a provision for the payment of subcontractors, laborers, material suppliers, and those performing services.

(b) This subsection does not apply if the contractor elects to furnish a payment bond under section 13.1 of this chapter. The board shall withhold money from the contract price in a sufficient amount to pay the subcontractors, laborers, material suppliers, and those furnishing services.

SECTION 4. IC 36-1-12-13.1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 13.1. (a) This section applies to contracts for public work only if both of the following apply:

(1) The cost of the public work is estimated to be more than one hundred thousand dollars (\$100,000).

(2) The public work contractor has elected under section 10.5(b)(2) of this chapter to furnish a payment bond under this section.

(b) The contractor shall execute a payment bond to the appropriate political subdivision or agency, approved by and for the benefit of the political subdivision or agency, in an amount equal to the contract price. The payment bond is binding on the contractor, the subcontractor, and their successors and assigns for the payment of all indebtedness to a person for labor and service performed, material furnished, or services rendered. The payment bond must state that it is for the benefit of the subcontractors, laborers, material suppliers, and those performing services.

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(c) The payment bond shall be deposited with the board. The payment bond must specify that:

- (1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;
- (2) a defect in the public work contract; or
- (3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety. The surety of the payment bond may not be released until one (1) year after the board's final settlement with the contractor.

(d) A person to whom money is due for labor performed, material furnished, or services provided shall, within sixty (60) days after the completion of the labor or service, or within sixty (60) days after the last item of material has been furnished, file with the board signed duplicate statements of the amount due. The board shall forward to the surety of the payment bond one (1) of the signed duplicate statements. However, failure of the board to forward a signed duplicate statement does not affect the rights of a person to whom money is due. In addition, a failure to forward the statement does not operate as a defense for the surety.

(e) An action may not be brought against the surety until thirty (30) days after the filing of the signed duplicate statements with the board. If the indebtedness is not paid in full at the end of that thirty (30) day period, the person may bring an action in court. The court action must be brought within sixty (60) days after the date of the final completion and acceptance of the public work.

SECTION 5. IC 36-1-12-13.3 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: **Sec. 13.3. (a) This section applies to a public work contract if all the following apply:**

- (1) The amount of the public work contract is more than one hundred thousand dollars (\$100,000).**
- (2) The public work contract is for a project other than highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way.**
- (3) The public work contractor has elected under section 10.5(b)(2) of this chapter to furnish a performance bond under this section.**

(b) The contractor shall furnish the board with a performance bond equal to the contract price. If acceptable to the board, the

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performance bond may provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price. The surety on the performance bond may not be released until one (1) year after the date of the board's final settlement with the contractor. The performance bond must specify that:

- (1) a modification, an omission, or an addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;
- (2) a defect in the public work contract; or
- (3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety.

(c) Actions against a surety on a performance bond must be brought within one (1) year after the date of the board's final settlement with the contractor.

(d) This subsection applies to public work contracts of less than two hundred fifty thousand dollars (\$250,000). The board may waive the performance bond requirement of this section and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution approved by the department of financial institutions instead of a performance bond. Subsections (b) through (c) and section 14.5 of this chapter apply to a letter of credit submitted under this subsection.

SECTION 6. IC 36-1-12-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 14. (a) This section applies to a public work ~~contracts~~ **contract if all the following apply:**

(1) **The amount of the public work contract is** in excess of one hundred thousand dollars (\$100,000).

(2) **The public work contract is for projects a project** other than highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way.

(3) **The public work contractor has elected under section 10.5(b)(1) of this chapter for retainage to be held.**

This section also applies to a lessor corporation qualifying under IC 21-5-11 or IC 21-5-12 or any other lease back arrangement containing an option to purchase, notwithstanding the statutory provisions governing those leases.

(b) A board that enters into a contract for public work, and a contractor who subcontracts parts of that contract, shall include in their respective contracts provisions for the retainage of portions of

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1 payments by the board to contractors, by contractors to subcontractors,
 2 and for the payment of subcontractors. Either the board or contractor,
 3 or both, shall place the retainage in an escrow account, with a bank,
 4 savings and loan institution, or the state as the escrow agent. The
 5 escrow agent shall be selected by mutual agreement between board and
 6 contractor or contractor and subcontractor under a written agreement
 7 among the bank or savings and loan institution and:

- 8 (1) the board and the contractor; or
- 9 (2) the subcontractor and the contractor.

10 (c) To determine the amount of retainage to be withheld, the board
 11 shall:

- 12 (1) withhold no more than ten percent (10%) of the dollar value
- 13 of all work satisfactorily completed until the public work is fifty
- 14 percent (50%) completed, and nothing further after that; or
- 15 (2) withhold no more than five percent (5%) of the dollar value of
- 16 all work satisfactorily completed until the public work is
- 17 substantially completed.

18 If upon substantial completion of the public work minor items remain
 19 uncompleted, an amount computed under subsection ~~(f)~~ (e) of this
 20 section shall be withheld until those items are completed.

21 (d) The escrow agreement must contain the following provisions:

- 22 (1) The escrow agent shall invest all escrowed principal in
- 23 obligations selected by the escrow agent.
- 24 (2) The escrow agent shall hold the escrowed principal and
- 25 income until receipt of notice from the board and the contractor,
- 26 or the contractor and the subcontractor, specifying the part of the
- 27 escrowed principal to be released from the escrow and the person
- 28 to whom that portion is to be released. After receipt of the notice,
- 29 the escrow agent shall remit the designated part of escrowed
- 30 principal and the same proportion of then escrowed income to the
- 31 person specified in the notice.
- 32 (3) The escrow agent shall be compensated for the agent's
- 33 services. The parties may agree on a reasonable fee comparable
- 34 with fees being charged for the handling of escrow accounts of
- 35 similar size and duration. The fee shall be paid from the escrowed
- 36 income.

37 The escrow agreement may include other terms and conditions
 38 consistent with this subsection, including provisions authorizing the
 39 escrow agent to commingle the escrowed funds with funds held in
 40 other escrow accounts and limiting the liability of the escrow agent.

41 ~~(e) The contractor shall furnish the board with a performance bond~~
 42 ~~equal to the contract price. If acceptable to the board, the performance~~

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bond may provide for incremental bonding in the form of multiple or chronological bonds that, when taken as a whole, equal the contract price. The surety on the performance bond may not be released until one (1) year after the date of the board's final settlement with the contractor. The performance bond must specify that:

(1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;

(2) a defect in the public work contract; or

(3) a defect in the proceedings preliminary to the letting and awarding of the public work contract;

does not discharge the surety.

(f) The contractor shall be paid in full, including all escrowed principal and escrowed income, by the board and escrow agent, within sixty-one (61) days after the date of substantial completion, subject to sections 11 and 12 of this chapter.

(e) If within sixty-one (61) days after the date of substantial completion there remain uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect engineer shall be withheld until the item is completed. Required warranties begin not later than the date of substantial completion.

(g) Actions against a surety on a performance bond must be brought within one (1) year after the date of the board's final settlement with the contractor.

(h) This subsection applies to public work contracts of less than two hundred fifty thousand dollars (\$250,000). The board may waive the performance bond requirement of subsection (e) and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution approved by the department of financial institutions instead of a performance bond. Subsections (e) through (g) apply to a letter of credit submitted under this subsection.

SECTION 7. IC 36-1-12-14.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: **Sec. 14.5. (a) The contractor shall be paid in full, including all escrowed principal and escrowed income, by the board and escrow agent not later than sixty-one (61) days after the date of substantial completion, subject to sections 11 and 12 of this chapter.**

(b) Required warranties begin not later than the date of substantial completion.



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